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Steve Charnovitz
George Washington University Law School, scharnovitz@law.gwu.edu

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USING FRAMEWORK STATUTES TO FACILITATE U.S. TREATYMAKING

What can be learned from the exemplary Congressional-Executive cooperation achieved in the negotiation, approval, and implementation of new U.S. free trade agreements (FTAs)? The significance of these FTAs for economic growth and international trade policy has been examined.[1] Yet insufficient attention has been given to the legal implications of this development for how the United States makes international commitments. Although U.S. trade agreements are gaining approval through enactment of a law, most other important U.S. international agreements face a more daunting challenge of gaining the "advice of consent" of the U.S. Senate by a two-thirds vote. In my view, the method used for trade is a good model for how U.S. negotiating and treatymaking could be carried out in other fields of international law. So far, little discussion has occurred about the value of such mimesis for U.S. Constitutional practice.

This comment seeks to open that constitutional door. Part I introduces the topic by contrasting the reliable process used for U.S. trade agreements to the less predictable process used for other treaties. The next two parts examine some key issues in considering a broader use of the trade agreement method. Part II addresses constitutionality and Part III the democratic acceptability of such a change. Part IV explains the centrality of a framework statute to enable the President and Congress to work in tandem in making international commitments. Part V concludes.

I. INTRODUCTION

This is the final draft version of the paper published in the *American Journal of International Law*, October 2004.

[1] *See generally* FREE TRADE AGREEMENTS. U.S. STRATEGIES AND PRIORITIES (Jeffrey J. Schott ed., 2004).

During the first seven months of 2004, the United States consummated bilateral FTAs with Australia and Morocco, and a regional FTA with the Dominican Republic and Central America. The U.S.-Australia FTA was agreed to on February 8, 2004, signed on May 18, formally submitted to Congress on July 6, and by July 15, both the U.S. House of Representatives and the Senate had adopted legislation to "approve" and implement the FTA.[2] The U.S.-Morocco FTA was agreed to on March 2, 2004, signed on June 15, formally submitted to Congress on July 15, and by July 22, the Congress had adopted implementing legislation.[3] The United States-Dominican Republic-Central America FTA has been signed, and the timing of its submission to Congress depends on the forthcoming U.S. elections.

More FTAs are on the way. The United States is finalizing an FTA with Bahrain, and is in various stages of negotiation with Colombia, Ecuador, Panama, Peru, Thailand, and the five-nation Southern Africa Customs Union. Each FTA will get a prompt Congressional vote so long as the agreement is entered into before June 1, 2005, the expiration date in the 2002 law granting the President "Trade Promotion Authority."[4]

The Congressional vote tallies show the success of the trade agreement approval process. Trade Promotion Authority was initially employed in 2003 when the Congress approved FTAs with Chile and Singapore by substantial majorities—over 63 percent in the House and over 67 percent in

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[2]*See* United States-Australia Free Trade Agreement Implementation Act, Pub. L. No. 108–286, §2 (2004).

[3]*See* United States-Morocco Free Trade Agreement Implementation Act, Pub. L. No. 108-__ (2004).

[4]19 USCS § 3803(a) (2004). This deadline may be extended to 2007 by the President.

the Senate. The recent FTAs with Australia and Morocco gained even greater support, over 74 percent in the House and over 83 percent in the Senate.

These huge majorities are especially impressive when one recalls that the law providing Trade Promotion Authority took many years to come to fruition.[5] Similar trade authority, then called "fast track,"[6] was granted by Congress in 1988, and was used to approve and implement U.S. participation in the North America Free Trade Agreement (NAFTA) and the Agreement Establishing the World Trade Organization (WTO). Unfortunately, after the expiration of that authority in 1994, Congressional politics prevented a renewal until 2002. As a consequence, the intervening eight years were largely fallow for new two-way trade liberalization.

When President George W. Bush came into office, he sought trade negotiating authority. In a speech to business leaders in mid-2001, he explained:

> But in order for me to be effective on trade, I need trade promotion authority. I need the ability to speak with a single voice for our country. I need to have the capacity as an administration to negotiate free trade agreements without the

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[5]*See* Laura L. Wright, *Trade Promotion Authority: Fast Track for the Twenty-First Century,* 12 WM. & MARY BILL OF RTS. 979 (2004).

[6]The term "fast track" was used in the 1988 law authorizing trade negotiations, but that term was dropped in the Bipartisan Trade Promotion Authority Act of 2002. *Compare* 19 USCS § 2903(b) (2004) *with* 19 USCS § 3803 (2004). Apparently, the term "fast track" was thought to carry too much political baggage.

> fear of them being undermined. Otherwise, our trading partners are going to be confused and concerned about an honest and open dialog.[7]

Following some close votes, the Congress succeeded in crafting a multi-step framework for new trade negotiations. Specifically, the new statute: (1) gave the President a negotiating mandate, (2) set 17 principal U.S. negotiating objectives, (3) required regular consultation between the Executive Branch and the Congress, (4) set timetables for various notifications and reports to the Congress, (5) solicited reports from numerous advisory committees, and (6) guaranteed prompt House and Senate consideration, without amendment, of implementing legislation, as prepared by the President following consultations with the relevant Congressional committees.[8]

This temporary procedure supplements the President's inherent negotiating authority. Under Article II, section 2, clause 2 of U.S. Constitution, "He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur . . . ."[9] Thus, the President may choose to submit trade agreements to the Senate as Article II "treaties," and throughout American history, many agreements on "Friendship, Commerce and Navigation," investment, and trade relations have gone through the "advice and consent" process. In recent decades, however, the President has not exercised the Article II option for trade agreements. Instead, he has sent trade agreements to the House and Senate for approval and implementation through the legislative process.

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[7] *Remarks to the Business Roundtable*, PUBLIC PAPERS OF THE PRESIDENTS. GEORGE W. BUSH 2001, Vol. 1, at 705, 708.

[8] 19 USCS § 3801 et seq. (2004).

[9] U.S. CONST. art. II, §2, cl. 2. Hereinafter, this clause will be referred to as "Article II."

The contemporary U.S. practice is for trade agreements to be considered on a fast track and non-trade agreements on the slower track of Senate "advice and consent."[10] This divergence is puzzling. Trade agreements are negotiated and approved using framework procedures that promote cooperation between the Executive and Legislative branches. Yet other topics of international cooperation are pursued without a statutory framework and sometimes without cooperation between the President and the Senate. These diverging approaches can lead to unequal results.

The slower track of Senate "advice and consent" sometimes works to effectuate new international engagements, but sometimes it fails.[11] One recurring problem is Senate inaction. Under Senate rules, no expedited procedure exists whereby a President can call for a vote on a

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[10]U.S. Presidents use a variety of authorities to achieve new international agreements. The most prominent are:

1. a "sole executive agreement" based on the President's independent Constitutional authority,

2. an agreement pre-authorized by Congress,

3. an agreement submitted to Congress for review and approval,

4. an agreement submitted by the President to the Senate for advice and consent.

This comment discusses the possibility of substituting the third method for many international agreements now processed using the fourth method.

[11]LEE HAMILTON (WITH JORDAN TAMA), A CREATIVE TENSION. THE FOREIGN POLICY ROLES OF THE PRESIDENT AND CONGRESS 65 (2002).

resolution of ratification. Another impediment may be a need for Congress to act on implementing legislation.[12]

The field of environmental law provides good examples of ongoing dysfunctions in the treaty ratification process. Consider the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. This Convention was consented to by the Senate in 1992, but remains unratified by the United States because even a dozen years later, the Congress has not approved implementing legislation.[13] The Basel Convention is an unusual episode in that Senate consent occurred despite the absence of implementing legislation. A more common outcome is for the Senate to withhold consent while awaiting the adoption of such legislation. That is the predicament of the 2001 Stockholm Convention on Persistent Organic Pollutants and the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.[14] In other instances, an environment convention is sent to the

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[12]Chandler P. Anderson, *The Extent and Limitations on the Treaty-Making Power under the Constitution*, 1 AJIL 636, 648 (1907) (noting the sanction of custom for the proposition that where certain powers are expressly confided by the Constitution to Congress, the concurrence of both houses of Congress is necessary in order to make effective a treaty undertaking).

[13]Linda Roeder, *Bush Administration Plans to Introduce Basel Convention Legislation in Congress*, DAILY REP. FOR EXECUTIVES (BNA), June 11, 2004, at A-29.

[14]Pat Phibbs, *Joining Environmental Treaties Prompts Sharp Debate in the United States*, DAILY REP. FOR EXECUTIVES (BNA), July 19, 2004, at C-1. Even though the Rotterdam Convention is about international trade, no special procedure exists to expedite implementing legislation.

Senate for consent, but then the convention is never brought to a vote. That was what happened to the 1992 Convention on Biological Diversity, a widely-ratified treaty with 188 state parties.

Securing Senate action on human rights conventions can also prove difficult. Consider the International Labor Organization's Convention on Freedom of Association and Protection of the Right to Organise (No. 87). That convention was sent to the Senate in 1949, but continues to be detained in the Senate Committee on Foreign Relations. One wonders whether 34 senators would have the temerity to vote against this fundamental labor rights convention if it were brought to a vote. A similar fate has befallen the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). That Convention has been waiting for Senate consideration since 1980. In some instances, the prospects for gaining Senate consent and/or Congressional implementation are so daunting that a treaty is never even transmitted to the Senate. That is the story with the 1989 U.N. Convention on the Rights of the Child. In the absence of a process for working through the myriad issues of state versus federal law and in the face of opposition from then-Senator Jesse Helms, no viable path existed to achieve U.S. ratification.

In some instances, fundamental human rights treaties do emerge from the Senate, but only after unconscionable delay. The most poignant tale of survival occurred with the International Convention on the Prevention and Punishment of the Crime of Genocide. The Convention was transmitted to the Senate in 1949, but not consented to until February 1986. This consent was subject to a declaration that the instrument of ratification not be deposited until after Congress adopted implementing legislation. Doing so took until November 1988, and then the United States finally joined the Convention. The 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment suffered considerable, though much less, delay in the Congress. The Convention was transmitted to the Senate in 1988, and consented to in 1990. The

enactment of implementing legislation was not completed until 1994, however, after which the United States ratified the Convention.

The need to coordinate treaty consent with implementing legislation is a common problem, and can be seen in the processing of the 1993 Convention on Protection of Children and Co-operation in Respect to Intercountry Adoption. That Convention was transmitted to the Senate in June 1998.[15] Separately, the House and Senate began writing implementing legislation. The two pathways converged on September 20, 2000, when the Senate adopted both the resolution of ratification and the House-passed implementing bill.[16] This elapsed time of 27 months may be better than average for international agreements that need implementing legislation, but that odyssey is significantly longer than the short excursions enjoyed by FTAs.

The U.N. Convention on the Law of the Sea is a multiplex treaty with important implications for security, transportation, environment, and human rights. The Convention began its Senate voyage in 1994. Finally, in early 2004, it was unanimously reported by the Senate Foreign Relations Committee, but so far, a full Senate vote has not been scheduled.[17]

The different procedural approach for trade versus other agreements is perplexing, and yet a close look at current U.S. practice reveals a deeper mystery. Following the dictates of Trade Promotion Authority, the new FTAs negotiated by the Bush Administration do far more than open

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[15]Sean D. Murphy, *U.S. Implementation of Intercountry Adoption Convention*, 95 AJIL 416 (2001).

[16]146 CONG. REC. S8866 (Sept. 20, 2000).

[17]*See* Steve Hirsch, *Law of the Sea Treaty Getting Submerged*, NAT'L J., Apr. 10, 2004, at 1126-27*; Former Legal Advisers' Letter on Accession to the Law of the Sea Convention*, Editors' Note, 98 AJIL 307 & n. 1 (2004)

up trade. As the chief U.S. trade negotiator explains, "America's FTAs break new ground—they establish prototypes for liberalization in areas such as services, e-commerce, intellectual property for knowledge societies, transparency in government regulation, and better enforcement of labor and environmental protections."[18] The Australia FTA addresses additional areas such as pharmaceuticals, law enforcement cooperation, investment, and anti-corruption.[19] These areas of law singularly are often the object of Article II treaties. Yet when these issues are wrapped into an FTA, the President and Senate see a way to bypass the Constitution's advice and consent requirements.

II. CONSTITUTIONALITY

Part II provides an overview of two constitutional issues involved in bypassing Senate advice and consent: First, can an Congressional-Executive agreement properly serve as a substitute for a treaty approved via the Article II procedure? Second, and if so, could the method used for trade agreements be extended to other agreements?

The *Restatement of the Foreign Relations Law of the United States* defines "Congressional-Executive agreements" as international agreements in which Congress authorizes the President to

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[18]Robert B. Zoellick, *Our Credo: Free Trade and Competition*, WALL ST. J., July 10, 2003, at A10.

[19]U.S.-Australia Free Trade Agreement, May 18, 2004 (not yet in force), Annex 2-C, art. 6.5, chap. 11, art. 17.9, art. 17.10, art. 22.5, available at http://www.ustr.gov. Some of the provisions on pharmaceuticals drew controversy. Marilyn Chase & Sarah Lueck, *In New Trade Pacts, U.S. Seeks To Limit Reach of Generic Drugs*, N.Y. TIMES, July 6, 2004, at A1; Elizabeth Becker & Robert Pear, *Trade Agreement May Undercut Importing of Inexpensive Drugs*, N.Y. TIMES, July 12, 2004, at A1.

negotiate and conclude an agreement or in which Congress approves an agreement already concluded by the President.[20] According to the *Restatement*, "the prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance."[21] The *Restatement* does not dwell on the distinction between an international agreement pre-authorized by Congress and an agreement directly approved by Congress.

This distinction gained attention in Bruce Ackerman and David Golove's masterful study *Is NAFTA Constitutional?*[22] The authors typologize the two forms of Congressional-Executive agreement and use the terms "*ex ante*" and "*ex post*" to distinguish them.[23] They call the latter type the "modern congressional-executive agreement."[24] In their account of the history, the first modern agreement was set in motion in 1923 when the Congress tasked the World War Foreign Debt Commission to negotiate settlements with countries owing debts to the United States, with those agreements then to be considered for "approval" by the Congress.[25]

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[20]RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1987) [hereinafter RESTATEMENT (THIRD)].

[21]*Id*.

[22]BRUCE ACKERMAN & DAVID GOLOVE, IS NAFTA CONSTITUTIONAL? (1995).

[23]*Id*. at 24, 27.

[24]*Id*. at 2.

[25]*Id*. at 40-41. Nine years after the 1923 law, the Chairman of the House Committee on Foreign Affairs gave a presentation at the ASIL annual meeting where he pointed out this "striking instance of international agreement authorized by Congress" and noted how that procedure was "ignoring the rule of treaty-making with the consent of two-thirds of the Senate." J. Charles Linthicum, *The*

Ackerman and Golove seem to apply the term "modern Congressional-Executive agreement" to any agreement subsequently approved by the Congress rather than reserving it for those approved pursuant to a framework analogous to the one used in the war debt statute. For example, they note the significance of Congressional approval of the Bretton Woods Agreements Act.[26] In that episode, no prior negotiating mandate existed.

In my view, the truly modern form of Congressional-Executive agreement originates with a framework statute that does three things: (1) it invites the Executive to undertake specified negotiations, (2) it promises Congressional consideration of a law to approve the resulting agreement, and (3) it offers expedited House and Senate procedures. Trade Promotion Authority is the fullest development of such a statute. It marries an advance negotiating mandate from the Congress to a procedure for an *ex post* vote on any agreement transmitted to the Congress.

The question of the constitutional validity of a decision by Congress and the President to use a Congressional-Executive agreement may not be justiciable. The legality of the law approving NAFTA was challenged by a group of plaintiffs who contended that NAFTA was void because it had not been consented to by a two-thirds Senate vote. The plaintiffs lost in the U.S. district court, but then that decision was ordered vacated by the U.S. Court of Appeals for the 11th Circuit on the grounds that the case presented a nonjusticiable political question.[27]

Committee on Foreign Affairs of the House of Representatives and the Treaty-Making Power, 26 ASIL PROC. 249, 252 (1932) (footnote omitted).

[26]ACKERMAN & GOLOVE, *supra* note 22, at 91, 94; 22 USCS §286 (2004).

[27]Made in the USA Foundation et al. v. United States, 56 F. Supp. 2d 1226 (1999), *vacated by* 242 F.3d 1300, 1319-20 (2001), *cert. denied* 534 U.S. 1039 (2001).

No case before the Supreme Court has examined the constitutionality of the *ex post* form of Congressional-Executive agreement. Nevertheless, an important development recently occurred in the Supreme Court's *Garamendi* decision finding the preemption of state law by an international agreement.[28] The Court stated that ". . . our cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic."[29] None of the authorities cited in the Court's opinion involved Congressional-Executive agreements specifically approved by Congress. Moreover, the executive agreement at issue in *Garamendi* had not been approved by Congress. Thus, the dicta in *Garamendi* about no "approval by Congress" might have little weight on that issue. And yet that statement by the Court breaks new ground in seeing "approval by Congress" as a parallel to "ratification by the Senate." The dissent also has noteworthy dicta. *Garamendi* was a 5-4 decision, with the dissenters opposing preemption. In a footnote, the dissent quotes Louis Henkin as stating that "there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate (or of both houses), but neither Justice Sutherland [in *United States v. Belmont, 301 U.S. 324, 81 L.*

[28]American Insurance Association et al. v. John Garamendi, 539 U.S. 396 (2003) [hereinafter "Garamendi"]. The issue in the case was whether a U.S. agreement with Germany regarding Holocaust claims preempted California's Holocaust Victim Insurance Relief Act. The Court found preemption. *See* Brandon P. Denning, *International Decisions, American Insurance Ass'n v. Garamendi,* and *Deutsch v. Turner Corp.,* 97 AJIL 950 (2003).

[29]*Garamendi,* 539 U.S. at 415.

Ed. 1134, 57 S. Ct. 758 (1937)] nor any one else has told us which are which."[30] The appearance of this footnote might be read as a judicial acknowledgement of Congressional competence to "consent" to international agreements.

The constitutionality of the Congressional-Executive agreement in the *ex post* form has been debated for years. One of the earliest critics was Edwin Borchard in the 1940s who distinguished agreements sanctioned by Congress following a negotiation from agreements that are pre-authorized by Congress. Borchard denied the validity of the *ex post* form while seeming to accept the *ex ante* form in certain circumstances.[31] When the same Constitutional issue arose in the early 1990s during Congressional consideration of the WTO, some critics took the position that Congressional approval of a trade agreement could not substitute for a two-thirds vote in the Senate on a resolution of treaty ratification.[32]

The scholar who received the most attention was Laurence H. Tribe who argued that the *ex post* form of Congressional-Executive agreement was not constitutionally proper even though an *ex ante* delegation by Congress to the President can enable the President to conclude certain

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[30]*Garamendi*, 539 U.S. at 430, 436 n. 3 (Ginsburg, J., dissenting). This footnote in the dissenting opinion refers to: LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 222 (2nd ed. 1996).

[31]Edwin Borchard, *Treaties and Executive Agreements–A Reply*, 54 YALE L. J. 616, 621-22 & n. 24, 653 (1945). Borchard saw no justification in the Constitution for a power of Congress to sanction, approve, validate or ratify international agreements.

[32]For a summary of the debate, *see* Detlev F. Vagts, *The Exclusive Treaty Power Revisited*, 89 AJIL 40 (1995).

international agreements.[33] Although any capsulization of Tribe's nuanced analysis would not do it justice, his most salient objection seems to be the textual one that Congressional power to give *ex post* approval to international agreements is not specifically listed in the Constitution. Tribe is right about that, and yet the Constitution is similarly silent on whether the Congress may give *ex ante* agreement-making authority. If textual silence precludes *ex post* approval, then why doesn't it also preclude *ex ante* approval? Tribe further argues that if it were true that Congress may approve an international agreement by law, then Congress, by overriding a President's veto, would have a path for "ratifying any such international agreement even over the President's vehement objection," and such a result would be "dramatically at odds with the well-accepted principle that the President is the primary representative of the nation in foreign affairs."[34] The problem with this argument, however, is that only the President may ratify an international agreement.[35] The Congress itself cannot ratify a treaty or demand that the President do so.

A Congressional competence to give *ex post* approval to an international agreement would seem to be conceptually intertwined with the power of Congress to give advance authorization for

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[33]Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1234-35 n. 47, 1258, 1261, 1269-70, 1277-78 (1995). An extensive response to Tribe's thesis appears in David M. Golove, *Against Free-Form Formalism,* 73 N.Y.U.L. REV. 1791 (1998).

[34]Tribe, *supra* note 33, at 1254.

[35]RESTATEMENT (THIRD), *supra* note 20 § 312 cmt. j.

the same agreement.[36] The logic of representative government is in some tension with the claim that Congressional authorization for an international agreement must occur before the President negotiates it, and may not occur after the Congress has read it. Both the *ex ante* and *ex post* forms of Congressional-Executive agreement stem from the same premise that the Article II Senate consent procedure is not the exclusive means of enabling the United States to enter into an international agreement.

No contemporary scholarship has come to my attention arguing that Senate consent via Article II is a precondition for the United States to enter into *any* international agreement. Rather, the debate has been whether there are some agreements that must receive consent from two-thirds of the Senate.

One apparent limitation is that an international agreement containing a commitment for action beyond Congress's legislative powers would have to be an Article II treaty. As Detlev F.

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[36]*See* Detlev F. Vagts, *International Agreements, the Senate and the Constitutio*n, 36 COLUM. J. TRANSNAT'L L. 143, 148 (1998); David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1992 (2003) (explaining that *ex post* agreements are *ex ante* in a Constitutional sense because Congressional approval takes place before the President makes a binding commitment). Perhaps the earliest scholarship to question the before/after distinction is the seminal study, Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, Part 1, 54 YALE L.J. 181, 199-200 n. 22 (1945) ("One wonders again where constitutional basis can be found for introducing a time element—valid before Presidential action, invalid after Presidential action—into Congress's powers to authorize or sanction international agreements within the scope of its competence.").

Vagts has noted, proponents of Congressional-Executive agreements have always conceded that any such agreement must be justifiable under a Congressional power to enact legislation.[37] Yet that constraint does not illuminate a clear line because the delineation of Congress's enumerated legislative powers remains contested, especially in an era in which the Supreme Court is narrowing the limits on when federal law can oust state governmental authority.[38]

Further delineation may hinge on the significance of the international agreement at issue. Several analysts have posited that the importance of an international agreement, its permanence, or its potential impact on U.S. sovereignty may require that such an agreement obtain consent from two-thirds of the Senate. For example, Louis Henkin stated that "[t]he constitutionality of the Congressional-Executive agreement is established . . . ," but that "doubts might spark if it were used for an agreement traditionally dealt with by treaty and that seems to ask for the additional 'dignity' of a treaty, for example, a major alliance or disarmament agreement."[39] Laurence H. Tribe

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[37]Vagts, *supra* note 36, at 147. *See* RESTATEMENT (THIRD), *supra* note 20 § 303(2) and the quotation above from McDougal and Lans, *supra* note 36.

[38]*See* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003) (discussing the recent cases).

[39]HENKIN, *supra* note 30, at 217. The reference to "dignity" comes from *Altman* case where the Supreme Court decided that the term "treaty" in a jurisdictional statute also encompassed a commercial agreement that had been pre-authorized by the Congress yet "was not a treaty possessing the dignity of one requiring ratification by the Senate . . . ." B. Altman & Co. v. United States, 224 U.S. 583, 601 (1912). The *Altman* Court thus implicitly acknowledged the existence of a class of U.S. international compacts that did not require consent by the Senate. The implications of this holding for facilitating U.S. international agreements was recognized immediately by the

explained that "In deciding whether an international agreement is of the type into . . . which the President may not enter without the consent of a Senate supermajority, one must consider the degree to which an agreement constrains federal or state sovereignty and submits United States citizens or political entities to the authority of bodies wholly or partially separate from the ordinary arms of federal or state government."[40] Andrew T. Hyman postulated that any significant long-term international compact must be treated as an Article II treaty.[41] These assorted claims about the exclusivity of Article II are derived from the Constitutional text and the original intent of the framers regarding a special Senate role as adviser to the President and as institutional guardian of the states. Moreover, as Thomas M. Franck and Edward Weisband have noted, the two-thirds requirement and its formulation suggests that the framers of the Constitution "wanted important international commitments made by a process requiring a higher degree of consensus than is needed to pass an ordinary law."[42]

Nevertheless, an originalist intent about Senate advice and consent needs to be considered in light of the evolving practice over the next two centuries of effectuating many international

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editors of the *AJIL*. *Applicability of the Case of Altman v. The United States to Special Agreements Concluded under a General Treaty of Arbitration*, 6 AJIL 716 (1912).

[40]Tribe, *supra* note 33, at 1268.

[41]Andrew T. Hyman, *The Unconstitutionality of Long-term Nuclear Pacts that are Rejected by One-Third of the Senate*, 23 DENV. J. INT'L L. & POL'Y 313, 316-17 (1995). The framework statute for the negotiation of nuclear pacts is 42 USCS 2153 (2004).

[42]THOMAS M. FRANCK & EDWARD WEISBAND, FOREIGN POLICY BY CONGRESS 144 (1979).

agreements without use of Article II's formal procedures.[43] As early as 1792, in a law that gave birth to the *ex ante* Congressional-Executive agreement, the Congress provided authority to the Postmaster General to make arrangements with other countries.[44] By the late 19th century, the use of such advance authority became more frequent as did actions by the President to enter into international agreements based on sole executive authority. Such non-use of Senate advice and consent was rationalized by a doctrine that a U.S. international agreement not going through the Article II process was not a "treaty" under that provision even while serving as a treaty under international law.

This doctrine and the practice it reflects answers my first question posed above. The modern Congressional-Executive agreement may validly serve as a substitute for the Article II procedure. Employing a Congressional-Executive agreement does not transgress the Constitution's separation of powers. Certainly, it does not reduce the power of the Senate because no agreement can be authorized *ex ante* or approved *ex post* without the concurrence of the Senate.[45] To be sure, such procedures may undercut the clout of individual senators to delay a Senate treaty vote, but the Senate's tolerance for such obstructionism is hardly required by the Constitution.

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[43]*See* Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 1009 (2001) (presenting a theory of constitutional increments).

[44]An Act to establish the post-office and post-roads within the United States, 1 Stat. 232, 239 (1792).

[45]*See* RESTATEMENT (THIRD), *supra* note 20 § 303 reporters' note 8. Of course, Senate approval of an agreement by a majority vote does not legitimize the process if one believes that the Senate has a Constitutional responsibility to approve agreements by a two-thirds vote.

The second question—how far can we go with the method now used for trade agreements—also requires a complex constitutional inquiry. The most extensive analysis was authored by John C. Yoo and published in 2001.[46] Yoo argues that a Congressional-Executive agreement cannot be used when the federal government reaches an agreement on matters outside of the Congressional powers identified in Article I, section 8 of the U.S. Constitution or on matters in which the President and Congress possess concurrent and potentially conflicting powers.[47] Based on this theory, Yoo states that Congressional-Executive agreements ought to be used for agreements on international trade, finance, and intellectual property, but cannot be used for agreements on human rights, extradition, political-military issues, and arms control.[48] He sees environment as lying in-between depending on the substance of a particular agreement.[49]

Both Yoo's theory and its application to particular agreements are contestable; yet even in its formulation, the theory provides capacious opportunities for using Congressional-Executive

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[46]John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001).

[47]*Id*. at 821. Furthermore, he asserts that Article II treaties may be used for matters within Congress's powers, but if so, such treaties must be non-self-executing. *Id.*

[48]*Id*. at 822-23, 849. Building on Yoo's work, another analyst has suggested that the Constitution gives the President discretion to decide when a temporary national security accord should be approved as a Congressional-Executive agreement. Christopher B. Stone, *Signaling Behavior, Congressional-Executive Agreements, and the Salt I Interim Agreement*, 34 GEO. WASH. INT'L L. REV. 305, 347-50 (2002).

[49]Yoo *supra* note 46, at 829, 849.

agreements in many areas where they are not currently used. For example, under Yoo's theory, Congressional-Executive agreements would be doable for issues such as investment, intellectual property, and some environmental agreements. Whether Yoo has been too cautious in ruling out Congressional-Executive agreements for human rights is a matter deserving future analysis.

The use of legislation to approve trade agreements is sometimes said to be warranted by the Constitutional rule that bills for raising revenue are to originate in the U.S. House of Representatives.[50] Although Article II lacks any textual basis for such a claim, the more devastating critique is that, far from justifying the singularity of trade agreements, this argument opens the door to legislative approval of any revenue-related international agreement. For example, tax treaties might be approved by Congressional-Executive agreement rather than by Senate advice and consent as they are now.

Another defense for special treatment of trade agreements is "tradition." Trade truly is distinguishable from other fields in that there is a tradition of processing trade agreements through the House-Senate route.[51] Other fields like environment and labor do not enjoy that tradition. Nevertheless, all traditions begin at some point. The fact that the current crop of FTAs include environment and labor commitments may itself be rooting a new tradition of doing without Senate advice and consent for those issues.

The tradition in U.S. trade policy of circumventing the Senate treaty process began because the Senate recognized the disjunction between its authority to consent to a trade treaty and its dependence on the House to initiate legislation to implement the agreement. The initial solution reached was to enact a law giving the President *ex ante* authority to enter into trade agreements.

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[50]U.S. CONST. art. I, §7, cl. 1; RESTATEMENT (THIRD), *supra* note 20 § 303 reporters' note 9.

[51]Vagts, *supra* note 32, at 41.

This solution worked for many decades, until the nature of trade agreements expanded to include nontariff issues. Congress responded to this new development by restructuring the process to an *ex post* one whereby a completed trade agreement is put up for a two-house vote.

The same imperatives that led to the use of Congressional-Executive agreements on trade have now become just as pressing for many other international issues where Senate advice and consent is insufficient for the President to carry out a treaty. The challenge of Congressional implementation of treaties was not fully thought through by the framers of the Constitution.[52] Nevertheless, they wrote a Constitution dynamic enough to permit elected officials to devise a solution through the evolution of practice. That solution is the Congressional-Executive Agreement which uses a single legal instrument to achieve the dual purposes of treaty approval and implementation.

III. DEMOCRATIC ACCEPTABILITY

Since 1990, some observers have challenged as undemocratic the use of fast-track procedures to approve trade agreements.[53] Critics object to Congressional rules that forbid amendments to the proposed implementing legislation, and that provide automatic House and Senate votes. For example, during the 1994 Senate debate on approving the WTO Agreement,

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[52]The limited attention given by the framers is reviewed in Yoo, *supra* note 46, at 834-36.

[53]For a discussion of these criticisms, see Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 161-71 (1992); Robert E. Hudec, *"Circumventing" Democracy: The Political Morality of Trade Negotiations,* 25 N.Y.U. J. INT'L L & POL. 311 (1993).

Senator Robert C. Byrd lamented "the rape of the legislative process by the fast-track procedures" and called these procedures "destructive of the sovereignty of the people of this Republic."[54]

Even if it is true that fast-track procedures do reduce democracy in one metric, this line of criticism errs by considering the issue too narrowly. Democracy is not just a fixed set of procedures. It is a method of government that enables the public to achieve its collective will. The quality of democracy will be a function both of the representativeness of decisionmakers and the effectiveness of decisionmaking processes. The procedures employed for trade agreements offer several pro-democratic advantages over the procedures typically used in Article II treaties. One can see this by examining three distinct phases of the treatymaking process—international negotiation, treaty approval, and domestic implementation.

The first phase is international negotiation. Although prudent Presidents contemplating treaties will seek and listen to the guidance of the Senate, regularized modalities often do not exist to gain Senate input. As a result, the views of the President and the Senate may not mesh.

Recall the most famous episode of Senate obstruction, the defeat of the Treaty of Versailles. The key counsel from the Senate was the "Round Robin" signed by 37 Republican senators on March 4, 1919.[55] This resolution by Senator Henry Cabot Lodge called for finalizing a peace treaty

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[54]140 CONG. REC. S15104 (daily ed. Nov. 30, 1994).

[55]George A. Finch, *The Treaty of Peace with Germany in the United States Senate*, 14 AJIL 155, 156-157 (1920); DANIEL PATRICK MOYNIHAN, ON THE LAW OF NATIONS 50 (1990). Wilson had neglected to provide a consultative role for key senators during the Paris Peace Conference. A generation later, President Franklin D. Roosevelt did not make Wilson's mistake in the U.S. preparations for the conference to draft the United Nations Charter. The Roosevelt Administration invited leading members of the Senate and House to serve as advisers on the U.S. delegation to the

before taking up the League of Nations. Lodge's short resolution was offered almost two months after the Paris peace talks had begun, and was not voted on by the Senate. If, instead, President Woodrow Wilson had solicited senatorial guidance a timely manner, perhaps the Senate's Weltanschauung and Wilson's actions would have been better aligned. When significant Senate advice was ultimately given, it bubbled up in the form of numerous "reservations" formulated well after the treaty was signed in June. Although the decades after 1919 have brought much better channels of communication between the President and the Senate, some chronic deficiencies persist.

Fast forward to July 1997: Several years into the process of negotiating national commitments to reduce greenhouse gas emissions, the Senate voted 95-0 for the Byrd-Hagel resolution.[56] This resolution states that the United States should not be a signatory to an emissions protocol that fails to include commitments for developing countries or that would seriously harm the U.S. economy.[57] To be sure, Byrd-Hagel was better than the 1919 Round Robin in having been voted on by the Senate in advance of the negotiations in Kyoto that were expected to finalize the Protocol. Nevertheless, Byrd-Hagel seems a flawed way for the Senate to formulate and communicate U.S. negotiating objectives, especially in comparison to Trade Promotion Authority.

San Francisco conference. STEPHEN C. SCHLESINGER, ACT OF CREATION. THE FOUNDING OF THE UNITED NATIONS 62, 121 (2003)

[56]Helen Dewar, *Senate Advises Against Emissions Treaty That Lets Developing Nations Pollute*, WASH. POST, July 26, 1997, at A11.

[57]S. Res. 98, 143 CONG. REC. S8138-9 (July 25, 1997). The resolution is reprinted and its issues discussed in DAVID G. VICTOR, CLIMATE CHANGE. DEBATING AMERICA'S POLICY OPTIONS (2004), *available at* http://www.cfr.org/climatechange.

Consider several key differences: Trade Promotion Authority is a law passed by both houses while Byrd-Hagel is a resolution approved only by the Senate. In Trade Promotion Authority, the Congress gave the Administration a negotiating mandate with detailed objectives to be pursued in forthcoming negotiations. By contrast, in Byrd-Hagel, the Senate merely told the Administration what not to do. No backdrop law setting specific U.S. objectives for climate negotiations existed at that time[58]—and still does not! In Trade Promotion Authority, the entire Congress acted positively to empower the President and the U.S. Trade Representative by offering them a pathway for implementing a trade agreement. Yet in Byrd-Hagel, there was no operational mandate, unless one counts the gratuitous directive to the U.S. Secretary of State to transmit a copy of the resolution to the President.[59] In Trade Promotion Authority, the Congress designed detailed procedures for Executive branch consultations with relevant Congressional committees and committee leadership at every stage in the process.[60] Moreover, members of Congress participate

[58]A law enacted in 1987 provided a "Mandate for action on the global climate," but only vague goals were set, including working toward multilateral agreements. *See* 15 USCS § 2901 note (2004). The Congress did not update that law following the U.S. ratification in 1992 of the U.N. Framework Convention on Climate Change.

[59]S. Res. 98, *supra* note 57, §2.

[60]*See, e.g.*, 19 USCS § 3804 (2004), 19 USCS § 3807 (2004).

as advisers during trade negotiations.[61] By contrast for climate change, the Congressional participation is less formalized.[62]

Is the Byrd-Hagel approach for shaping international negotiations more "democratic" than Trade Promotion Authority? Perhaps the estimable Senator Byrd thinks so. Yet in my view, Byrd-Hagel is far less democratic both in not being bicameral and in not making a constructive contribution toward achieving what the U.S. public seems to want[63]—a workable international regime to prevent global climate change.

The Byrd-Hagel resolution exemplifies the chronic deficiencies in the "advice" half of Senate "advice and consent." Usually, the counsel given is informal, from individual senators rather than from the Senate. When guidance does come from the Senate as in Byrd-Hagel, the guidance may be too-little, too-late.

Very often, what is missing is an effective process for lawmakers to offer advice to the President in advance. The important role of regular Congressional input on foreign policy was expressed well in the dictum that Senator Arthur Vandenberg offered President Harry S Truman in

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[61]19 USCS § 2211 (2004).

[62]*See* Kevin Sullivan, *Four U.S. Senators Lobbying in Kyoto; Viewpoints Vary on Climate Treaty*, WASH. POST, Dec. 3, 1997, at A35.

[63]For polling data, see "Americans on Climate Change," June 25, 2004, available at http://www.pipa.org. *But see* Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1682-83 (2003) (using the example of climate change to point out that tricky issues arise when polls say one thing and representatives act otherwise).

1947: "If you expect us with you on the landing, Mr. President, you need us with you on the takeoff."[64]

Under Trade Promotion Authority, the Congress stands with the President on takeoff and hopefully also on landing. The framework statute helps to overcome the centrifugal forces of Article II which sometimes pull the President and Senate apart and lead them to insist upon their prerogatives. Even Edwin Borchard—perhaps the most energetic academic opponent of replacing treaties with executive agreements—recognized that bringing the U.S. House of Representatives into the approval process could provide an opportunity for enhancing consultation during the making of treaties.[65]

Another benefit of the trade mechanism is that the negotiating objectives set by Congress are transparent to the U.S. public and to the world. By contrast, in other issue areas, the United States often goes into multilateral negotiations without Congressionally-set objectives. In such situations, the President and his Administration will determine the U.S. position, but may not do so in a transparent manner and with adequate accountability to the Congress and the public.[66]

The second of the three phases is treaty approval. Trade agreements are guaranteed a Congressional vote; treaties considered for Senate consent are not. Moreover, Senate procedures have many awkward features. For example, a practice has developed of including within the

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[64]As quoted in JIM WRIGHT, BALANCE OF POWER 181 (1996).

[65]Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 38 AJIL 637, 639 (1944).

[66]James Brown Scott, *Treaty-making Under the Authority of the United States*, 28 ASIL PROC. 2, 15 (1934) (noting how the President, with rare exceptions, "acted on his own advice" and then submitted treaties to the Senate after they have been concluded).

resolution of ratification certain declarations that purport to govern how the treaty interacts with domestic law.[67] This practice is certainly not inscribed in the Constitution and seems undemocratic in comparison to having the entire Congress deal with issues of domestic effect, as is done with trade agreements.[68]

The third phase is treaty implementation. Even when the Senate has consented to a treaty or would consent, the United States may fail to become a party because of a lack of implementing legislation. The adoption of implementing legislation will often be a challenge because it requires agreement on the same text by the House, the Senate, and the President.

Not all treaties need implementing legislation.[69] Yet many do, and it is with those that the Senate's consent role in Article II can fall out-of-sync with the Congress's legislative role in Article I. In the future, international agreements may increasingly interpenetrate domestic law in difficult areas like application to the states and judicial enforcement of individual rights.

Because contemporary trade agreements will always require implementation, the Congress and President have worked together to devise expedited procedures to secure an up-or-down vote on such legislation. Although Congress helps to draft the implementing bill, the ultimate sign-off is

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[67]*See* Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 61 CHI.-KENT L. REVIEW 515 (1991); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AJIL 341, 347 (1995).

[68]*See, e.g.,* 19 USCS § 3512 (2004) (regarding the domestic effect of the WTO Agreement).

[69]Some U.S. treaties may be self-executing. Damrosch, *supra* note 67, at 529; John H. Jackson, *The Effect of Treaties in Domestic Law in the United States*, in JACKSON, THE JURISPRUDENCE OF GATT & THE WTO 297 (2000).

with the President to assure that the legislation will be acceptable to him. The non-amendability of the bill avoids the possibility that the House and Senate might not reach a final vote because of unresolved differences. The trade procedures blend a constructivist role for the Congress at the initiation of new policy with a parliamentary-style following the completion of negotiations.

The reason that the procedures for international agreements may validly differ from the regular order for domestic legislation is that the United States is part of a larger world. Although "We, the People" of the United States can ultimately control what the U.S. government does, we lack that authority with the other 191 governments. This leads to a basic conundrum for self-government which is that internal democracy is necessarily incomplete whenever there are public needs requiring international cooperation.[70] A recognition of this interdependence[71] adds texture to our understanding of U.S. constitutional democracy.

U.S. citizens seeking to influence the direction of the trading system will benefit from increasing the capacity of the U.S. government to work with the world. Without a clear legislative path for approving and implementing a new trade agreement, the President will be handicapped in negotiating with other governments. By contrast, when a fast track mechanism is available, the

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[70]*See* Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AJIL 259, 271 (1992) ("The ordering of the affairs of nations in their relationships with one another has steadily eroded the power of nations to please themselves.").

[71]*See* Missouri v. Holland, 252 U.S. 416, 435 (1920) ("But for the treaty and the [implementing] statute there soon might be no birds for any powers to deal with."). Justice Oliver Wendell Holmes Jr.'s opinion for the Court upheld the constitutionality of both the Migratory Bird Treaty Act and the Convention for the Protection of Migratory Birds in the United States and Canada.

U.S. public has a better chance to succeed through the President in securing needed cooperation from other countries. Surely that posture enhances the quality of American democracy.

The unique role of the United States in world affairs makes this case even stronger. Because of the bigness of the United States, other countries regularly look to it for leadership. Yet too often the United States fails the international community because, other than in trade, its cumbersome procedures for treatymaking do not match its global leadership aspirations.

Whenever existing U.S. law does not meet the requirements of new trade agreements, the implementing legislation proposed by the President makes the requisite statutory changes. For any FTA, there will be changes required in U.S. tariffs. Yet because trade agreements embrace non-trade issues, there may also be provisions in domestic law that have to be revised. When the Congress approved and implemented the NAFTA and WTO agreements in the early 1990s, there were many such changes accomplished.[72] The post-2002 FTAs, by contrast, have not necessitated many substantive alterations in U.S. domestic law.

Critics of trade fast track sometimes worry that a hurried Congress will merely rubberstamp a bad international agreement, and that this possibility undermines U.S. democracy. The concern is justifiable, and needs to be addressed by assuring that the framework statute assigns Congress a significant consultative role. Moreover, one should not forget that Congress commits only to vote on and not necessarily to approve a proposed trade agreement.

The Congressional consideration of the Singapore and Chile FTAs in 2003 provides an example of how the process proved flexible enough to accommodate last-minute adjustments. Each

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[72]*See* North America Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993); Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994). The Uruguay Round of negotiations led to the establishment of the WTO.

of these FTAs promised a specific number of U.S. entry visas for business persons. When the draft implementing legislation was being reviewed by the Congress, the House and Senate Judiciary Committees objected to the draft because it would have granted the visas outside of the overall U.S. quota. Recognizing that it had gone too far, the Administration accepted a change in the draft legislation to earmark the visas within the existing quota.[73]

In addition to showing that the implementation process is not a rubber stamp, this episode also points to some possible boundaries in using fast-track procedures to alter domestic law. In response to the contretemps, the Senate passed a resolution stating that "future trade agreements to which the United States is a party and the legislation implementing the agreements should not contain immigration-related provisions."[74] The resolution was not clear, however, as to whether the perceived problem was that immigration was being negotiated in an international agreement or that a trade agreement was being used to set U.S. immigration policy.

IV. THE CENTRALITY OF A FRAMEWORK STATUTE

In the second edition of *Foreign Affairs and the United States Constitution* (1996), Louis Henkin writes that "the constitutionality of the Congressional-Executive agreement seems established, it is used regularly at least for trade and postal agreements, and remains available to the President for wide, even general use should the treaty process again prove difficult," provided that a

[73]Christopher S. Rugaber, *Chile, Singapore Draft Legislation Approved by House, Senate Panels*, DAILY REP. FOR EXECUTIVES (BNA), July 11, 2003, at A-30. Making this fix was easier for a bilateral agreement than it would have been for a multilateral agreement.

[74]S. Res 211, 149 CONG. REC. S10589 (July 31, 2003).

majority of the Senate is willing.[75] In another book he authored, Henkin suggests that "it may be time for the two houses to seek—at least—to develop a general principle for identifying international agreements that might be sent to both houses for approval rather than to the Senate alone."[76] In this comment, I call for Congress identify other international issues besides trade that would benefit from a bicameral approval procedure.

The essence of the modern Congressional-Executive agreement is a forward-looking process whereby the Congress votes to authorize the President to negotiate under certain conditions and then puts to a vote any agreement submitted. The two Congressional decisions on each end provide the trusses of a more democratic architecture for U.S. treatymaking. This architecture blends the benefits of Presidential leadership with Congressional oversight over U.S. international commitments.

The ordering of mandate first and approval second is not required by the Constitution. What does depend on this order, however, is the political practicality of replicating the trade agreement experience in other areas of international law. The trade process has succeeded because all the players share the expectation that the framework of two-house approval will be used in place of Senate advise and consent.[77] Such expectations can only apply to future actions. That is why I am not suggesting that the Congress take some dusty treaties off the Senate's shelf, and consider an ad

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[75]HENKIN, *supra* note 30, at 218.

[76]LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 61 (1990).

[77]*See* Spiro, *supra* note 43, at 1002-03 (suggesting that if either the NAFTA or WTO agreements had been submitted to the Senate as an Article II treaty, that departure would have sparked a furious constitutional debate).

hoc law to approve them. The two-house procedure is most legitimate when applied prospectively pursuant to a framework statute.

The idea of a "framework" statute was conceptualized in 1976 by Gerhard Casper.[78] Casper pointed to the War Powers Resolution and the Congressional Budget and Impoundment Control Act as examples of law that "interprets the Constitution by providing a legal framework for the governmental decisionmaking process."[79] He explained that a framework statute does not formulate specific policies for the resolution of specific problems, but rather attempts to implement constitutional policies. In Casper's vision, the purpose of a framework statute is to regulate decisionmaking and add stability to the relationship between the President and Congress.

Building on Casper's insight 14 years later, Harold Hongju Koh emphasized the constructive potential of "framework" legislation on national security matters.[80] Koh suggested that such a statute should "acknowledge the executive's leading constitutional role in foreign affairs, at the same time as it seeks to reduce the isolation that currently surrounds executive branch deliberations, and to increase congressional-executive dialogue while foreign policy objectives are being set and initiatives implemented."[81] Although he did not specifically endorse the idea of enacting framework

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[78]Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 482 (1976).

[79]*Id*. at 482.

[80]HAROLD KONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 6, 69, 160 (1990). Koh also calls it "charter" legislation.

[81]*Id*. at 160.

statutes for other topics, Koh called for "centralizing congressional procedures for deciding whether particular substantive agreements should be ratified by treaty or executive agreement."[82]

In my view, the Senate and House should use a framework statute for many topics of international agreement that could then bypass the Senate's creaky advice and consent process.[83] The practice of doing this for trade and almost nowhere else is unjustifiable, especially as U.S. trade agreements increasingly incorporate non-trade issues.[84] Recall the reasons stated by President Bush as to why he wanted Trade Promotion Authority—the need to speak with a single voice and the

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[82] *Id*. at 195.

[83] Other analysts have advocated a broader use of the fast track mechanism. *See* I.M. DESTLER & C. RANDALL HENNING, DOLLAR POLITICS: EXCHANGE RATE POLICYMAKING IN THE UNITED STATES 163-64 (1989) (suggesting a fast track for international fiscal policy agreements); Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GW J. INT'L L. & ECON. 687, 722-34 (1996) (proposing a fast track for arms control and environmental agreements). *See also* John K. Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?,* 31 J. LEGAL STUD. 5, 31 (2002) (discussing the lack of use of a Congressional-Executive agreement for environmental issues and observing that no one appears to have imagined that the Kyoto Protocol could take a pre-ratification pathway other than via Article II).

[84] One colleague raises the point that expanding the trade approach to other fields could led to dilution of its attractive features that could come back to bite future trade-authorizing legislation. Although I acknowledge that danger, I wonder whether reserving rapid procedures only for trade agreements will remain politically sustainable.

value of an honest and open dialog with other governments. This same situation exists in other fields of international law, and yet no specialized "Promotion Authority" is available for U.S. international objectives other than trade.

One example of where a framework law could have been useful was the drafting of the Rome Statute of the International Criminal Court (ICC), where U.S. negotiators lacked transparent negotiating objectives. The Congress did not get around to passing a framework law on the ICC until over four years *after* the Rome Statute was adopted. That law—the American Servicemember's Protection Act—is essentially reactive and encourages the President to negotiate bilateral agreements with other countries to safeguard U.S. personnel from the ICC's grasp.[85]

An advance negotiating mandate from the Congress is especially important in the most delicate area of U.S. treatymaking, that is, when the United States promises to make significant changes in its domestic law. This result may occur by design in trade negotiations, as happened with NAFTA and the WTO. In such situations, the Congress uses implementing legislation to conform U.S. law to the trade agreement. Yet in other fields that lack a framework statute, the process often operates in reverse. U.S. negotiators may resist provisions in new international agreements that require changes in U.S. law. In effect, U.S. negotiators aim to conform the protean treaty to existing domestic law.

The framework approach used in trade can be deployed in a variety of ways. It can be used to guide U.S. participation in specialized international organizations (e.g., the World Health

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[85]22 USCS § 7426(c) (2004). *See* Sean D. Murphy, *U.S. Bilateral Agreements Relating to ICC*, 97 AJIL 200 (2003). A U.S. law passed in 1994 had included a "sense of the Senate" regarding the establishment of an International Criminal Court. Pub. L. No. 103-236 § 517, 108 Stat. 382, 468 (1994).

Organization), in autonomous institutional arrangements (e.g., the ozone regime), and in transgovernmental fora (e.g., the G-8). It can also be used when a new series of bilateral agreements is contemplated (e.g., extradition).

Although Trade Promotion Authority serves as a useful prototype, the framework statute for each issue area needs to be individualized. Perhaps the most significant variable is the amount of substantive decisionmaking called for in the national implementation of a new treaty. The recent U.S. FTAs have been on the low end of the scale with little discretion left to the parties. Climate change lies on the high end because under the Kyoto Protocol each party retains considerable flexibility as to how to comply with the emissions target. When a treaty combines substantive obligations with low "prescriptiveness" on how to achieve them, the rapid Congressional procedures used for trade would not be transferable without significant modification.

Another design feature to explore is whether to require more than a simple majority vote in the Congress to approve a particular kind of international agreement. Throughout the long debate on the treaty approval process, most of the attention has surrounded the dichotomy between the current two-thirds rule and a simple majority of both houses.[86] Nevertheless, those are not the only choices available. The special procedures for approving trade agreements require a simple majority in each house, and yet that percentage may be raised by changing the House and Senate rules in the

[86]*See, e.g.*, James W. Garner, *Acts and Joint Resolutions of Congress as Substitutes for Treaties*, 29 AJIL 482-483 (1935); Quincy Wright, *The United States and International Agreements*, 38 AJIL 341, 345-5 (1944); Herbert Wright, *The Two-Thirds Vote of the Senate in Treaty-Making*, 38 AJIL 643 (1944); Arthur H. Dean, *Amending the Treaty Power*, 6 STAN. L. REV. 589 (1954); Tribe, *supra* note 33.

Trade Promotion law. The main key to the success of these procedures has been the automatic up-or-down vote in each house rather than the level of majority required.[87]

V. CONCLUSION

The blossoming of the modern Congressional-Executive agreement for trade negotiations shows how constitutional practice can evolve to facilitate U.S. economic cooperation with other countries. The practice of having separate tracks for Senate consent to a treaty and that treaty's implementation does not operate as effectively as using a single fast track to authorize negotiations and then tee up a Congressional vote on approving and implementing the ensuing agreement. This procedure works for trade because the Congress and the President have agreed to a framework to codify the expectations that each branch has for the other's behavior. The time has come to apply the lessons of this trade law innovation to other important transborder and global challenges facing the United States.

STEVE CHARNOVITZ

[87]Most U.S. trade agreements put to a vote have received broad Congressional approval, but one had a close vote. In November 1993, the Congress approved NAFTA by a 53.9 percent majority in the House and a 61.6 percent majority in the Senate.